Separate Opinion of Judge *ad hoc* Mensah

1. I have some doubts about the claim of Côte d'Ivoire to the maritime areas in dispute. In particular, I do not think that this claim has serious prospects of success on the merits. However, I agree with the finding of the Chamber that the claim is plausible. This is because I accept that the test of "plausibility" is the only test that is applicable at this stage of the proceedings when the Special Chamber is not dealing with the merits of the case. I also agree with the finding that, if the Special Chamber finds that any part of the disputed area pertains to Cote d'Ivoire, the activities being undertaken by Ghana in the area would pose a risk of prejudice to the rights that Côte d'Ivoire claims, and the risk is imminent. Consequently, I agree that the ordering of some provisional measures, to protect the rights which Côte d'Ivoire claims in the area, is appropriate in the circumstances of the case.

2. However, I do not think that the first provisional measure requested by Côte d'Ivoire should be granted. Côte d'Ivoire requests the Chamber to order Ghana "to take all steps to "suspend all ongoing oil exploration and exploitation operations in the disputed area". I do not consider that such an order would be appropriate in this case.

3. Article 290, paragraph 1, of the Convention gives power to the Special Chamber (and to other competent courts and tribunals) to prescribe provisional measures that "it considers [to be] appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision". As has repeatedly been underlined by the International Court of Justice (ICJ), and by other international courts and tribunals which have been called upon to pronounce on the matter, provisional measures have as their object "preservation of the respective rights of *the parties in the case*, pending the final decision on the merits".

4. In its Order of 15 March 1996 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice explained: "it follows that the Court must be concerned to preserve by such measures "the rights which may subsequently be adjudged to belong to either party". This means that provisional measures ordered by the Special Chamber should have as their object, preservation of the rights not only of the party which requests the measures, but also the rights of the other Party in the dispute. In other words, the measures prescribed by the Chamber should be such that they protect the rights that may subsequently be adjudged to "belong either to the Applicant or to the Respondent" (*Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13, at p. 21, para. 35).

5. When a court or tribunal considers a request for the prescription of provisional measures, it is necessarily faced with different rights or claimed rights, that is to say, the rights claimed by the opposing parties in the case. In most cases, these rights are in conflict. In such a situation, the court or tribunal is obliged to weigh the different rights of the parties against each other.

6. Ghana has cogently argued that the activities of exploration and exploitation that it has undertaken or authorized in the disputed area "are not new". Its argument is that, in line with a Decree issued by the then President of Côte d'Ivoire, Ghana has for a very long time ("more than four decades") regarded the equidistance line as the border between Ghana and Côte d'Ivoire. Ghana states that it has treated this line as the "international border" in every concession agreement; in every one of the seismic and other exploratory activity; in all the drilling and development activities and in all its communications with Côte d'Ivoire and third parties ever since. Ghana denies that it has acted imprudently or illegitimately in authorizing activities in the disputed area and claims that Côte d'Ivoire had been fully aware of these activities and has in fact facilitated some of them. In any case, Ghana claims that Côte d'Ivoire has not objected to any of these activities until the present case was submitted to arbitration. Hence, according to Ghana, Côte d'Ivoire cannot now be permitted to object to any of these activities.

7. Ghana also submits that the provisional measures requested by Côte d'Ivoire, especially an order to Ghana to "cease all exploration and exploitation activities in the disputed area" would "deliver a crippling blow to Ghana's petroleum industry, cause major dislocations and set back economic development for many years". Ghana maintains that an order to stop all its activities in the disputed area would "have grave consequences for Ghana and for its contractors, subcontractors, community stakeholders and its lending parties". According to Ghana, a "mega- project of this scale and complexity involves bringing together myriad of contractors, sub-contractors, community stakeholders and lending parties in a series of highly complex and interlinked relationships".

8. Ghana submits that "stopping such a project midstream is physically very difficult and not possible without incurring enormous adverse financial consequences for all the parties involved". Ghana, therefore, argues that an order to Ghana to suspend activities of exploration and exploitation in the disputed area would have "serious and catastrophic consequences" not just for the Ghana but also for the persons engaged in these activities.

9. Ghana also argues that an order to suspend all exploration and exploitation activities in the disputed area would have serious and catastrophic consequences for the marine environment. For example, it claims that there is a real possibility of some of the wells already drilled would become flooded and cause serious damage to the marine environment.

10. Ghana further contends that the only losses that Côte d'Ivoire is likely to sustain from any of Ghana's activities in the disputed area would be monetary in nature, and can, therefore, be compensated through appropriate reparations awarded by the Special Chamber. Accordingly, Ghana maintains that any such losses would not constitute "irreparable damage" and do not, therefore, justify the ordering of provisional measures.

11. In this connection, it is pertinent to note that Ghana has stated, in its Written Statement, that "information about petroleum recovered is recorded in detail as part of standard practice in petroleum production and revenue accounting". As regards the right claimed by Côte d'Ivoire to exclusive access to confidential information about natural resources of the continental shelf,

Ghana has stated (again in its Written Statement) that "the information currently being gathered in the disputed area will be duly recorded" and will be made available to Côte d'Ivoire, "if Ghana were ordered to do so at the conclusion of the case" In effect, Ghana has given a written assurance and undertaking that it will provide Côte d'Ivoire with information on oil recovered from the disputed area and any information about natural resources of the continental shelf in the disputed area, if it is ordered to do so at the conclusion of the case, and the Special Chamber has placed this assurance and undertaking on record.

12. In the circumstances I endorse, and fully share, the decision of the Chamber, in effect, to reject the main provisional measures requested by Côte d'Ivoire. These would have ordered Ghana to "suspend all ongoing oil exploration and exploitation operations in the disputed area" and "refrain from granting any new permit for oil exploration and exploitation in the disputed area".

13. I agree with the provisional measures ordered by the Special Chamber. In these measures the Special Chamber orders Ghana to refrain from conducting new exploration or exploitation drilling in the disputed area. Such an order takes due account of the interests and rights of both parties. It seeks to protect the respective rights of both the applicant and of the respondent. In my view it recognizes that Ghana's activities in the disputed area are reasonable and takes on board Ghana's contention that these activities are legitimate, and have been carried out over a long period with the full knowledge, and acquiescence, of Côte d'Ivoire.

14. I also observe that, in taking note of the assurance and undertaking of Ghana and placing it on record, the Special Chamber has underlined the fact that Ghana may be required to make appropriate reparations if, at the end of the case, the Special Chamber determines that any part of the disputed area pertains to Côte d'Ivoire and if it concludes that any rights of Côte d'Ivoire have been violated by the activities of Ghana in the area.

(*signed*) T. A. Mensah